U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE COMMANDANT
vs.	:	ON APPEAL
MERCHANT MARINER'S LICENSE NO. 650328 DOCUMENT NO. Z-12 89 533 Issued to: Louie W. JACQUE	:	NO. 2536

This appeal has been taken in accordance with 46 U.S.C. §7703 and 46 C.F.R. §5.701.

By an order dated 9 May 1991, an Administrative Law Judge of the United States Coast Guard at Alameda, California, revoked Appellant's Merchant Mariner's License and Document upon finding proved the charge and specification of violating 46 U.S.C. §7704 by using a controlled substance, cocaine. The specification found proved alleges that Appellant, while the holder of the above-captioned license and document, did, on or about 12 July 1990 have cocaine metabolite present in his body as revealed through a drug screening test.

Appellant submitted an answer of deny to the charge and specification.

Appellant was fully advised by the Administrative Law Judge that if the charge were found proved, an order of revocation

would be required unless Appellant provided satisfactory evidence of cure. No evidence of cure was submitted by Appellant. Accordingly, the Administrative Law Judge found the charge and specification proved and entered an order of revocation.

On 6 June 1991, Appellant petitioned the Administrative Law Judge to reopen the hearing to enable Appellant to submit evidence of cure. The petition was subsequently denied by a ruling of the Administrative Law Judge on 2 July 1991. On 16 July 1991, Appellant submitted a notice of appeal. On 13 September 1991, Appellant received the transcript of the proceedings and on 24 October 1991, Appellant filed a supporting appellate brief with the Commandant, thus perfecting his appeal. Accordingly, this matter is properly before the Commandant for review.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of Merchant Mariner's License 650328 and Document No. Z-12 89 533. His license authorizes Appellant to serve as second assistant engineer of steam and motor vessels of any horsepower.

On 12 July 1990, Appellant appeared at the St. Francis Memorial Hospital Laboratory, San Francisco, California as a precondition to serving as a crewmember aboard commercial vessels. This precondition was established by the Marine Engineer's Beneficial Association (MEBA), of which Appellant was a member.

Appellant provided a urine specimen and executed the required documentation including a Drug Testing and Custody Form. The urine specimen was sealed and placed in a protective plastic container in Appellant's presence. The specimen and documentation were sent to Nichols Institute, San Diego, California, a NIDA approved laboratory.

Appellant's specimen tested positive for cocaine (1,459 nanograms per milliliter). Appellant denied the use of cocaine to the Medical Review Officer. A subsequent test by Nichols Institute 17 days later indicated the presence of cocaine metabolite (1,299 nanograms per milliliter).

The Medical Review Officer concluded that there were no medical reasons for justifying the presence of cocaine in Appellant's system and concluded that the test results were positive for cocaine.

Appearance: Marvin Stender, Esq. 90 New Montgomery Street, 15th Floor, San Francisco, CA 94105-0313.

BASIS OF APPEAL

Appellant's brief is couched in terms of being a joint appeal from the Decision and Order of the Administrative Law Judge and an appeal from the Administrative Law Judge's ruling denying Appellant's petition to reopen.

Appellant asserts that the Administrative Law Judge erroneously denied his petition to reopen the hearing. He further contends that, consequently, he was denied the right to present evidence of "cure" and has been unfairly subjected to a permanent revocation of his license and document.

OPINION

Appellant argues that, at the hearing, he entered a plea of deny to the charge of drug use. Appellant offered the defense that the specimen which tested positive was not his and was confused with his specimen because of specimen collection irregularities. Appellant asserts that, having denied drug use by his plea, he found it inconsistent to concomitantly present evidence of cure at the hearing. As Appellant stated in his brief: "Such evidence of cure would have been factually and logically inconsistent with the evidence proffered by [Appellant] that he had not, in fact, used cocaine." Appellant Brief, p 4.

Accordingly, on 6 June 1991 (27 days after the Administrative Law Judge issued his Decision and Order of revocation), Appellant petitioned the Administrative Law Judge to reopen the hearing for "the sole purpose of submitting evidence that he was cured of the use of any dangerous drugs." Appellant Brief, p 4.

Appellant asserts that it was error for the Administrative Law Judge to deny his petition to reopen. I do not agree.

Title 46 C.F.R. §5.601 states that a respondent may petition to reopen a hearing on the basis of newly discovered evidence or on the basis of being unable to present evidence due to the respondent's inability to appear at the hearing through no fault of his own, due to circumstances beyond his control. See, Decision on Appeal 2533 (ORTIZ). Neither of these prerequisites exist in the case herein considered.

Appellant, represented by professional counsel, was present throughout the hearing. Furthermore, Appellant failed to demonstrate the existence of any newly discovered evidence that would affect the outcome of the case. In other words, Appellant has failed to produce any new evidence that would affect the ultimate finding of proved to the charge of drug use. Any evidence of cure pertains exclusively to mitigation, potentially affecting only the sanction ordered.

Appellant's decision not to present evidence of cure at the hearing was solely his personal choice in crafting his defense. It is noted that he made this choice with the full advice and presence of professional counsel. In the event that Appellant had presented evidence of cure to the satisfaction of the Administrative Law Judge, during the hearing, an order less than revocation could have been issued, pursuant to 46 U.S.C. §7704(c). However, in the absence of such evidence, the Administrative Law Judge was without discretion and issued an order of revocation as required by the statute.

Assuming in arguendo that evidence of cure existed at the time of the hearing and could have affected the outcome of the case, it still would not have constituted "newly discovered" evidence. In such a scenario, everything known to and available to Appellant was available to him at the time of the hearing. The mere fact that Appellant would tactically opt to use such known evidence to influence the case, subsequent to the hearing in a petition to reopen, does not change the character of the evidence from "existing" to "newly discovered." "The . . . skill

of [Appellant's] attorney on appeal does not enable him to convert evidence available at the hearing to "newly discovered" evidence merely because [his] attorney might have made a different use of the evidence available." Appeal Decisions 1804 (SOUZA); 1978 (DAVIS).

Based on the foregoing, I find that the Administrative Law Judge's denial of Appellant's petition to reopen the hearing was in accordance with applicable regulations and did not constitute error.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing and ruling on the petition to reopen were respectively conducted and made in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated 9 May 1991 at Long Beach, California and the ruling on the petition to reopen dated 2 July 1991 at Long Beach, California are AFFIRMED.

//S// MARTIN H. DANIELL
MARTIN H. DANIELL
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 18th day of February, 1992.